SUPREME COURT, U. S.

APPENDIX

NOV 22 1974

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5140

MICHAEL J. CASSIUS,

Petitioner,

—v.—

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

PETITION FOR CERTIORARI FILED AUGUST 13, 1974
CERTIORARI GRANTED OCTOBER 15, 1974

Supreme Court of the United States

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No. 74-5140

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—v.—

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 18, 1972—Complaint filed in Pima County, Arizona Justice Court No. 2, charging defendant and another man with burglary of a motor vehicle; defendant released on his own recognizance.

November 6, 1972—Complaint filed in Pima County, Arizona Justice Court No. 2, charging defendant with burglarly and committing a felony while on bail or recognizance on a felony charge; bond set at $2000.

November 14, 1972—Indictment returned charging defendant with burglary and committing a felony while on bail or recognizance on a felony charge (same case as complaint filed on November 6, 1972) (A-22303).

December 12, 1972—Indictment returned charging defendant and another man with burglary of a motor vehicle (same case as complaint filed October 18, 1972) (A-22479).

January 4, 1973—Defendant pleaded guilty to charge of burglary in Case No. A-22303; was found guilty in trial on stipulated facts of charge of committing a felony while on bail or recognizance on a felony charge (Case No. A-22303); charge in A-22479 is dismissed on motion of the State.

January 22, 1973—Defendant sentenced to imprisonment for not less than one nor more than two years on burglarly charge and to imprisonment for a consecutive term of not less than one nor more than three years on charge of committing a felony while on bail or recognizance on a felony charge.

March 21, 1973—Notice of appeal filed.

November 8, 1973—Opinion of the Arizona Court of Appeals filed, vacating judgment of conviction and sentence for charge of committing a felony while on bail or recognizance on a felony charge.

December 11, 1973—Arizona Court of Appeals denied State's Motion for Rehearing.

January 23, 1974—Arizona Supreme Court granted State's Petition for Review.

February 20, 1974—Arizona Supreme Court granted Defendant's Motion for Leave to submit additional written argument.

April 16, 1974—Opinion of the Arizona Supreme Court filed vacating decision of Arizona Court of Appeals and affirming the judgment and sentence of the trial court.

May 21, 1974—Arizona Supreme Court denied Defendant's Motion for Rehearing.

August 13, 1974—Petition for a Writ of Certiorari and Motion for Leave to Proceed in Forma Pauperis docketed in the Supreme Court of the United States.

October 15, 1974—Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari granted by the Supreme Court of the United States.

Precinct No. Two

IN THE JUSTICE COURT OF THE
STATE OF ARIZONA
COUNTY OF PIMA

No. 33836

STATE OF ARIZONA, PLAINTIFF,

vs.

ROY MOORE AND MICHAEL JEROME CASSIUS,
DEFENDANT(S)

Filed Oct. 18, 1972

CRIMINAL COMPLAINT

Felony

The undersigned having appeared personally and having been duly sworn does, upon information and belief, accuse ROY MOORE and MICHAEL JEROME CASSIUS and charges that in Pima County:

(BURGLARY)

On or about the 17th day of October 1972, ROY MOORE and MICHAEL JEROME CASSIUS committed burglary of the motor vehicle of ALEX DESOTO, a 1967 Chevrolet Van, white in color, Arizona License for 1972, JC 2125, VIN GS157P112680, all in violation of A.R.S. Section 13-302, as amended.

[Signatures and Subscription omitted in printing]

Precinct No. Two

IN THE JUSTICE COURT OF THE
STATE OF ARIZONA
COUNTY OF PIMA

No. 33907

STATE OF ARIZONA, PLAINTIFF,

vs.

MICHAEL J. CASSIUS, DEFENDANT(S)

Filed Nov. 6, 1972

CRIMINAL COMPLAINT

Felony

The undersigned having appeared personally and having been duly sworn does, upon information and belief, accuse MICHAEL J. CASSIUS and charges that in Pima County:

COUNT ONE (BURGLARY)

On or about the 4th day of November 1972, MICHAEL J. CASSIUS committed burglary of a store located at 200 South Park, Pima County, all in violation of A.R.S. Section 13-302, as amended.

COUNT TWO (COMMITTING FELONY WHILE ON BAIL OR OWN RECOGNIZANCE)

On or about the 4th day of November 1972, MICHAEL J. CASSIUS, while released on bond or his own recognizance on the felony charge of Burglary, Justice Court No. Two, No. 33836, committed the crime of Burglary, in violation of A.R.S. Section 13-1580.

[Signatures and Subscription omitted in printing]

BEFORE THE PIMA COUNTY GRAND JURY
TUCSON, ARIZONA

No. A-22303

7 GJ-179

STATE OF ARIZONA, PLAINTIFF,

vs.

MICHAEL J. CASSIUS, AKA CARL JACKSON, ACCUSED.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Filed Dec. 14, 1972

Proceedings had in the above-entitled matter before the Pima County Grand Jury in secret session on the 14th day of November, 1972, sitting in Courtroom No. 5 of the Superior Court, Tucson, Arizona.

PRESENT:

MR. GERARD R. O'MEARA
MR. TERRY G. DONALDSON
Deputy County Attorneys

[2] THE FOREMAN: We will go back on the record then. Do you have another case?

MR. O'MEARA: 7GJ-179, Cassius.

THE FOREMAN: 7GJ-179. The accused name is Cassius, Michael J., also known as Jackson, Carl. The charge is burglary, committing a felony while on bail or on own recognizance. The witnesses will be Officer Lanier and Officer Malm, M-a-l-m. Do any members of the grand jury know any of these people or feel they should be excused from considering this case?

Do you have a witness, sir?

MR. O'MEARA: Malm.

C

RICHARD MALM,

called as a witness before the grand jury, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. O'MEARA

THE FOREMAN: Sit there and speak into the mike, please.

MR. O'MEARA: Q Officer, will you state your name and occupation. A Richard Malm, patrolman, City of Tucson Police Department.

Q How long have you been with the Tucson [3] Police Department? A I have been with Tucson for a little over two years.

Q Were you with any other department before coming to Tucson? A Yes.

Q Which one and where? A Chicago, metropolitan area, for a little over six and a half years.

Q In what capacity are you presently employed with TPD? A I am with the service dog unit, the K-9 patrol of the city Police Department.

Q How long have you been on the K-9 patrol? A Just three months.

Q Were you on duty on November 4, 1972? A Yes, sir.

Q Do you remember the hours you worked that day? A We worked from 8:00 p.m. until 4:00 a.m. in the morning.

Q Did you have occasion at any time on November 4, 1972, to investigate a scene located at 200 South Park? A Yes, sir.

Q What is at 200 South Park? [4] A A business by the name of Tires West.

Q Is that in Pima County? A Yes, it is.

Q Did you have your dog with you at that time? A Yes, sir, I did.

Q Would you explain to the grand jury how it was you came to 200 South Park on November 4, 1972? A

Officer Lanier of the City Police Department had responded to a burglar alarm at that location. After arriving there he called for the assistance of one of the dog units, and I was the closest to his location and responded.

Q What time was it you arrived? A Shortly before midnight.

Q Would you describe for the grand jury exactly what transpired when you got there? A Yes. When I arrived there Officer Lanier took me around to the back of the building. On the west side at the north corner there is an overhead door leading into the warehouse of the particular building where they store tires. He showed me where there had been a handle in the overhead door removed and he thought there had been entry into the building from that location.

[5] At that time he thought he had heard someone inside the building and requested a service dog to attempt to search the building.

Q So what transpired next? A I advised the subject, or advised the interior of the building that I was giving them five minutes to come out or I was going to take the dog in the building. There was no response, and after the time passed I entered the building with my dog, searched the building. He located a subject inside the building in the bathroom, in the area of the offices in the front of the building. The subject was consequently arrested for burglary.

Q This particular subject you located in the building, was he alone or were there other people in there with him? A He was the only subject located inside the building.

Q Did you learn his name that evening? A That evening he gave us the name of Carl Jackson.

Q Have you subsequently learned this individual's true name? A Yes. I believe it to be Michael J. Cassius.

[6] Q Now while you were at the scene did you observe any other doors or windows at that particular establishment? A Yes, sir. After my dog alerted Mr. Jackson, or Cassius, as you will, he was removed from the

scene and the entire building was researched by myself and one other service dog unit.

Q Did you find anybody? A There was no one else in the building, but we did observe other doors and windows in the building, but we were unable to determine whether anybody else had been in the building with Jackson.

Q Were there any other places or points of entry that you were able to observe as you made your rounds that evening? A No, sir, there were not.

Q Just that one your originally found? A Yes, that is correct.

Q Officer Malm, did you at any time after that speak with any owner or manager or somebody in a managerial capacity with Tires West? A Yes, sir, I did.

Q With whom and when? A I believe it was Mr. Dick Smith, who is the owner of Tires West, and it was approximately an hour after I had searched the building and [7] arrested the subject. I had the desk, the Police Department desk call the owner of the business, and he responded to check the business with me to determine if there was a loss and to attempt to determine what the condition of the door was prior to the alarm.

Q What was this man's response? A He stated that upon his leaving earlier in the evening there was no damage to the particular door that was broken in to.

Upon searching the entire building with him after we had secured the building it was determined that numerous tires had been moved from their rows where they had normally been stored and placed in the middle of the store probably for removal by the subject.

Q Did Mr. Smith ever indicate to you, did he know Mr. Jackson or Mr. Cassius, whatever this man's name was? A He indicated to me at the time when I spoke with him during the investigation he thought he recognized him, but he wasn't sure and couldn't place the name. He asked me the subject's name and I advised him Carl Jackson, which was the name we knew him by at the time, and he stated he did not know Mr. Jackson by that name.

[8] Q Did he indicate whether of not he had given this particular individual, Mr. Jackson or Mr. Cassius, did he ever indicate whether or not he gave his permission to go in the building on that evening? A I asked him if he had. He said he not given anyone permission to be in it.

Q Now if you saw Mr. Cassius or Mr. Jackson, however he is known to you, if you saw this individual you found in the building that night, if you saw him again would you recognize him? A Yes, sir, I would.

Q Officer, isn't it also true that on November 4, 1972, that Mr. Cassius was released on his own recognizance, or he was on bond, in any event that he was in fact out and not in jail pending his connection with a felony charge of burglary in Justice Court number two, the case number being 33836? A It is my understanding through our records division and through the county attorney's records that he was in fact out on his own recognizance reference another felony charge. The case number and charge I am not familiar with.

Q Did you happen to have any conversation with this individual at the very time that you [9] apprehended him in the back part of the store? Did you say anything to him at that time? A I did not to him, but he did to me.

Q Would you indicate to the jury what it was he said to you? A Directly after my dog alerted on him I entered the bathroom, frisked him, handcuffed him. He asked me at that time—I don't know the exact words, but roughly, "How did you find out I was here? Does the building have an alarm or did someone see me come in?"

I did not at that time answer him nor did I advise him of his rights. My interest at the time was to find out if there was anyone else in the building.

I escorted him out of the building and turned him over to Officer Lanier on the exterior of the building and continued my search.

MR. O'MEARA: I have no further questions of this witness.

THE FOREMAN: Does any member of the grand jury have any questions to ask?

All right, sir. Thank you very much. You are excused. Well you step back out into the hall for a few moments?

(Witness excused.)

[10] THE FOREMAN: You have no more witnesses?

MR. O'MEARA: No.

THE FOREMAN: The charge is burglary and committing a felony while on bail or on his own recognizance. Is ther [sic] any question from any member of the grand jury on the law in this case?

All right. Then if the county attorneys and the court reporter will leave the room we will discuss the evidence presented.

(Whereupon the grand jury deliberated in secret session in the absence of counsel and the court reporter.)

THE FOREMAN: All right, sir. Let the record show in the case 7GJ-179, the accused, Michael J. Cassius, also known as Carl Jackson, charged with burglary and committing a felony while on bail or on his own recognizance, the grand jury voted a true bill evelen to zero.

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. A22303

STATE OF ARIZONA, PLAINTIFF,

vs.

MICHAEL J. CASSIUS, AKA CARL JACKSON, DEFENDANT(S)

INDICTMENT

Filed Nov. 14, 1972

The grand jurors of the county of Pima, in the name of the state of Arizona, and by its authority accuse MICHAEL J. CASSIUS, aka CARL JACKSON and charge that in Pima County:

COUNT ONE (BURGLARY)

On or about the 4th day of November, 1972, MICHAEL J. CASSIUS, also known as CARL JACKSON, committed burglary of a store located at 200 South Park, Pima County, all in violation of A.R.S. Section 13-302, as amended.

COUNT TWO (COMMITTING FELONY WHILE ON BAIL OR OWN RECOGNIZANCE)

On or about the 4th day of November, 1972, MICHAEL J. CASSIUS, also known as CARL JACKSON, while released on bond or his own recognizance on the felony charge of burglary, Justice Court No. Two, No. 33836, committed the crime of burglary, in violation of * * *

[Signatures Omitted in Printing]

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. A-22303

STATE OF ARIZONA, PLAINTIFF,

vs.

MICHAEL J. CASSIUS, DEFENDANT.

January 4, 1973

REPORTER'S TRANSCRIPT

Filed April 9, 1973

APPEARANCES:

JIM HOWARD, Esq., for the Plaintiff
JOHN HAWKINS, Esq., for the Defendatt [sic]

The above-entitled matter came on for hearing before the Honorable Jack C. Marks, Judge of the above-entitled Court, on the 4th day of January, 1973, and the following proceedings were had, to-wit:

PROCEEDINGS

THE COURT: State of Arizona, plaintiff, versus Michael J. Cassius, also known as Carl Jackson, defendant, A-22303, and State of Arizona, [2] plaintiff, versus Michael Jerome Cassius, defendant, A-22479.

Is the State ready? MR. HOWARD: State's ready, Your Honor.

THE COURT: Is the defendant ready? MR. HAWKINS: Yes, Your Honor.

THE COURT: What's before the Court, sir? MR. HAWKINS: Your Honor, this is the time set for a change of plea, and a plea bargain which has been worked out by Mr. Howard and me, whereby Mr. Cassius will

enter a plea to count 1 of A-22303, count 2 of the same number, A-22303, will be submitted to the Court on the basis of the Grand Jury transcript in that case, and a stipulation between counsel as to Mr. Cassius' release earlier on the charge in A-22479.

In addition, A-22479 will be dismissed and no other charges will be filed, and Mr. Howard will correct anything I have stated.

THE COURT: Mr. Howard, I understand everything except in relation to count 2 of the indictment in A-22303. MR. HOWARD: The charge in count 2 is committing a felony while released on his own recognizance on another felony charge, Your Honor, and the public defender would like to reserve their [3] right to examine that Statute on appeal, so are reluctant to enter a plea at this point, and would prefer to submit it to the Court on the stipulated facts in the Grand Jury transcript, and there are certain matters which I will ask the Court to take judicial notice of from the Court file.

THE COURT: Spell out those facts now, then, please? MR. HOWARD: Okay.

The facts that we stipulate to are: That that, and correct me if I am wrong, that the defendant was released on his own recognizance in Case Number A-22479 on the 18th of October, 1972, by the Justice Court, and remained released in that case until today.

That would be the stipulated fact, and I would ask the Court to take judicial notice of defendant's plea in A-22303, judicial notice that burglary is a felony in the State of Arizona.

Judicial notice that the burglary in A-22303 was one which happened on the 4th of November, or that pleadings and the Grand Jury transcript says it happened on the 4th of November, 1972. Judicial notice that the complaint filed in A-22479 was burglary and thus a felony, and judicial notice that the defendant was ordered [4] released—well, we have stipulated to that.

He was ordered released ROR on the 18th of October, 1972, and remained released until today.

THE COURT: I have great difficulty in understanding that last stipulation, though. He wasn't ordered re-

leased. A summons was issued for him and he was permitted to remain at liberty on his own recognizance, but there is nothing in the file that indicates that. MR. HOWARD: That Superior Court file does not reflect the release issued by the magistrate.

This particular case was instigated in the beginning or started by complaint filed in the Justice Court, and the Justice Precinct ordered him on this first appearance on the 18th of October and he was released on his own recognizance, and I have a witness here to put on to prove that.

To save time, we have decided to stipulate to that. It's not in the file, but it probably should be.

THE COURT: That's the reason I am saying, but if you stipulate to it, it's a fact, and do you so stipulate, Mr. Hawkins? MR. HAWKINS: Yes, I do, Your Honor.

[5] THE COURT: Very well. Then I'll take the plea on count 1 in A-22303, and it seems to me I can rule right away unless there is something in the Grand Jury transcript that's going to be different than what you have told me. Is there? MR. HAWKINS: I don't think so, Your Honor.

THE COURT: Are the facts before me now? MR. HOWARD: I think with the judicial notice the Court can take of those matters, I think you have all the facts, yes.

THE COURT: Then will you withdraw that portion of the stipulation relating to the transcript and I'll rule right away, because I think there's sufficient—

MR. HOWARD: Yes.

MR. HAWKINS: Yes.

THE COURT: All right. Show that portion of the stipulation has been withdrawn with leave of Court. I am going to read count 1 of the indictment to you in Case A-22303, Mr. Cassius, and ask you how you plead, guilty or not guilty.

Grand Jurors of the County of Pima, State of Arizona, and by its authority, accuse Michael J. Cassius, also known as Carl Jackson, [6] and charge that in Pima County, on or about the 4th day of November, 1972, Michael J.

Cassius, also known as Carl Jackson, committed burglary of a store located at 200 South Park, Pima County, on violation of ARS 13-302 as amended.

How do you plead? Guilty or not guilty to count 1 of the indictment filed on November 14, 1972, in Case Number A-22303? THE DEFENDANT: Guilty.

THE COURT: I would like you to answer some questions for me, please. Have you been advised and do you understand that you have a right to a speedy trial by a jury with respect to count 1 of this indictment, that you have a right to cross-examine witnesses who may testify against you and you have a privilege against you and you have a privilege against self-incrimination, that if you plead guilty and your plea is accepted by the Court, you are waiving such Constitutional rights and privileges? THE DEFENDANT: Yes.

THE COURT: Do you understand that you have a right to have an attorney present at the time of sentencing if your pleas of guilty are accepted? THE DEFENDANT: Yes.

[7] THE COURT: You understand that you are charged with the crime of burglary, in that in this County and State, on or about November 4, 1972, you committed a burglary of a store at 200 South Park? THE DEFENDANT: Yes.

THE COURT: Do you understand that burglary of a store means that you went in there with the intent to commit Grand or Petty Theft or other felony? THE DEFENDANT: Yes.

THE COURT: Did you do so? THE DEFENDANT: Yes.

THE COURT: What did you intend to do when you when into the 200 South Park? THE DEFENDANT: Steal some tires.

THE COURT: Thank you.

What would you value the tires at? THE DEFENDANT: Well, I didn't get a chance to rip them off.

THE COURT: You didn't get a chance to rip them off? THE DEFENDANT: Take them.

THE COURT: Who frustrated your chance? THE DEFENDANT: The Police Department.

THE COURT: Had you ripped them off, [8] what would they have been worth? THE DEFENDANT: That's hard to say, because I don't know when I would have stopped.

THE COURT: Well, since the burglary statute includes Petty and Grand Theft, I am not going to pursue this line of questioning any further.

You are pleading guilty because of some promise or representation by anyone as to what sentence the Court may impose upon you? THE DEFENDANT: No.

THE COURT: Are you pleading guilty because you have been threatened or coerced by someone to plead guilty? THE DEFENDANT: No.

THE COURT: Have any promises of any kind been made to you by anyone to induce the plea of guilty to Count 1 of A-22303, except, that if you do, the State would move to dismiss the indictment in case Number A-22479 and offer you an opportunity to plead not guilty to count 2, and on a stipulated set of facts, the Court would decide whether you are guilty or not on count 2? THE DEFENDANT: No.

MR. HAWKINS: And in addition to that, no additional charges.

[9] THE COURT: No additional charges will be filed. Is this as to the matters known or unknown or both? MR. HOWARD: As to any matters known, Your Honor.

THE COURT: As to any known matters. Very well. The answer is still no, right? THE DEFENDANT: Right.

THE COURT: Thank you. Was this a nighttime or a daytime burglary? THE DEFENDANT: Nighttime.

THE COURT: Therefore, I'll have to make a finding under the Rule that it's Burglary in the first degree, and the Court so finds.

The reason I have to do that is because the sentence varies. Do you understand that the sentence in the case of burglary in the first degree may be not less than one nor more than fifteen years in prison, in the State prison, or probation, based on the pre-sentence investigation report of the adult probation officer of this Court, which will be furnished to the Court prior to sentence? THE

DEFENDANT: Yes.

THE COURT: Have you discussed the facts or these cases, I should say, have you discussed [10] the facts of these cases and the entry of the plea of guilty to count 1 of the indictment in A-22303 with your attorney? THE DEFENDANT: Yes.

THE COURT: Are you satisfied with the representation and services of your attorney? THE DEFENDANT: Yes.

THE COURT: Do you have any complaint regarding the matter in which your attorney has represented you? THE DEFENDANT: No.

THE COURT: Let the record show it is the express finding of the Court that the defendant's plea of guilty to count 1 of the indictment in case Number A-22303 is made knowingly and voluntarily and with understanding of the nature of the charge against him, with an understanding of the consequences of the plea of guilty and that the plea of guilty is accepted. Now, with respect to count 2 of the indictment in case number A-22303, based upon the stipulation of counsel as to the facts, I find that you are guilty of count 2, which is committing a felony while on bail, or on your own recognizance.

Do I hear a motion with respect to the indictment in A-22479? MR. HOWARD: Your Honor, at this time the [11] State would move to dismiss the indictment in A-22479 as to the defendant Michael Jerome Cassius and as to that defendant only.

THE COURT: Any objection? MR. HAWKINS: No objection.

THE COURT: The motion is granted and the indictment filed December 12, 1972, in Case Number A-22479 is dismissed as to the defendant Michael Jerome Cassius only.

Will January 15 be all right for judgment and sentence? MR. HAWKINS: Yes, Your Honor.

THE COURT: Very well. It is ordered that judgment and sentence be pronounced with respect to the indictment in case A-22303, I should say judgment and sentence be pronounced in the indictment in Case A-

22303 on January 15, 1973, at 9:00 o'clock a.m. in Division 8 of this Court, and the defendant is remanded to the custody of the Sheriff of Pima County pending pronouncement of judgment and sentence.

MR. HAWKINS: The one additional matter, if we may, Your Honor, if the Court would entertain a motion for reduction of bond in this particular charge to $1,000 from the two that has been set.

The defendant, even in that situation, [12] would only be able to—I think his mother might be able to make the bond by putting up the automobile, and otherwise tying up her one piece of property that she owns, and Mr. Cassius has several matters here in Tucson that he needs to get cleared up if possible before whatever disposition is made, and we ask that it be reduced to $1,000.

THE COURT: Any objection? MR. HOWARD: The State would object, Your Honor, for several reasons. Mr. Cassius has a prior criminal record, and in fact is on parole from the State of California. This indicates to us that Mr. Cassius has roots not only in this community, but in other communities, and due to his criminal record and due to the Arizona multiple charges, the State feels that Mr. Cassius is not a very good risk for release on bond. I think that the Court should take into consideration the setting of the amount of bond and properly take that into consideration under the statutes.

THE COURT: What was he convicted of in California? MR. HOWARD: Burglary.

THE COURT: Burglary in California.

[13] MR. HOWARD: Prior to arrest for robbery in California, I don't know any of the facts in that case.

THE COURT: I said convicted. Burglary conviction in California and parole charge of burglary in A-22479, and then when he was released in that case for that charge, he then committed another burglary which he has admitted in open Court.

I would say the motion to reduce is denied.

MR. HAWKINS: Your Honor, if I might add a couple of things. He is on probation from California. David Smith, with the State Pardon & Parole, is his

probation officer, speaks highly of Mr. Cassius, it is detailed in this record.

THE COURT: Fine. When Mr. Smith comes into Court and speaks highly under oath, I might reconsider my decision. At this time, the decision, and without prejudice to any other application you may wish to make at a later time. The Court stands at recess in these matters and the defendant is remanded to the custody of the Sheriff of Pima County to await judgment and sentence or bail, as the case may be.

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IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

[Caption Omitting in Printing]

January 22, 1973

REPORTER'S TRANSCRIPT

Filed April 9, 1973

APPEARANCES:

TOM LETNES, Deputy County Attorney, for the Plaintiff

JOHN HAWKINS, Esq., for the Defendant

ROBERT LONG, Chief Deputy Adult Probation Officer

The above-entitled matter came on for hearing before the Honorable Jack G. Marks, Judge of the above-entitled Court, on the 22nd day of January, 1973, and the following proceedings were had, to wit:

PROCEEDINGS

THE COURT: State of Arizona, plaintiff, [15] versus Michael J. Cassius, Defendant, A-22303.

Is the State ready? MR. LETNES: Yes, Your Honor.

THE COURT: Is the defendant ready? MR. HAWKINS: Yes, Your Honor.

THE COURT: Is there any legal cause to show why judgment should not be pronounced? MR. HAWKINS: No, sir, there is not.

THE COURT: Any statement you wish to make, on behalf of Mr. Cassius at this time? MR. HAWKINS: Yes. I would, Your Honor. I don't know if the Court is aware—the Court has a detailed pre-sentence report before it and I would ask the Court to consider, though

his prior record does not look favorable, I would ask the Court to consider the involvement and circumstances of which these activities arose.

The frequent absence of his father, the family situation where it was too little money and too many children. His mother tried to work and stretch welfare, what little she had, as far as it would go. I think it is possible we might all be driven to do things and we wouldn't otherwise, faced with hunger, et cetera.

His problem subsequently was aggravated by heroin and drugs and that didn't help things. I [16] would ask the Court to consider that Mike is now 21 years of age and is worth saving at this point, that his family could use him financially and because he is the oldest male living at home. He has three younger siblings who could benefit. He is employed as a welder and would be employed as such, and I would ask the Court to consider it.

If the Court feels at the present time it is necessary, and I know that the Court is very much aware of the facts that count 2 in this case mandate consecutive sentence, I would ask the Court to consider, because of the mandatory consecutive sentence, that perhaps the total sentence of the two ought to be whatever the Court feels is the optimum sentence to imprison Mike.

His activities in the past cannot be repeated. He will have to prove it from what he has learned here and he will have to if he has to, spend time in prison, he will have to prove it in that, and know he cannot repeat the activities of the past; and last of all, for whatever value it is worth, Your Honor, we would ask you to consider that Mr. Cassius spent Saturday afternoon cooperating with the police, taking them to various places, and clearing records on their part, we do not have the confirmation from the County [17] Attorney or the police, but I understand 12 to 15 different ones, and I would ask the Court to consider.

THE COURT: That was for Mr. Cassius' benefit as well, as I explained to him in Chambers on January 19, that it would give him protection from further prosecution if he aided the police to close their cases, and if it amounted to 12 or 15 cases, then he has gained considerably by doing that.

MR. HAWKINS: Yes, Your Honor. I am sure it was of mutual benefit, and he understands that, and I would ask the Court to consider all circumstances in consideration.

THE COURT: Mr. Cassius, do you have anything to say on your own behalf, and in particular what happened since I saw you last on January 19, 1973? THE DEFENDANT: No, Your Honor.

THE COURT: Will you tell me anything about what you did with the police in the meantime? THE DEFENDANT: Well, I took them to different places where I committed crimes and told them what happened, how I did it, what I did with the merchandise, and, you know.

THE COURT: How many cases did you clear [18] up? THE DEFENDANT: About 15.

THE COURT: And were they all limited to burglaries, larceny and sale of marijuana? THE DEFENDANT: All burglaries.

THE COURT: Well, as I told you at that time, that was for your benefit as well as the police. THE DEFENDANT: Yes.

THE COURT: And that I couldn't give any hope that it might change the recommendation to send you to prison, because you yourself know that you have been living off society by these burglaries and thefts and drug matters, and that the time has come where you have got to go to prison.

I am sure that at 21 years of age, that this isn't either going to make you or break you by going to prison, but you have had too good a time on the public. THE DEFENDANT: Yes, sir. I know.

THE COURT: I can give you a break from the recommendation, but I am going to send you to prison. Is there anything else to say? THE DEFENDANT: No, Your Honor.

THE COURT: Does the State have anything to say? [19] MR. LETNES: No, Your Honor.

We will depend on the probation officer's recommendation.

THE COURT: Thank you.

With respect to count 1 of the indictment filed November 14, 1972, the defendant being asked to show legal cause why judgment should not be pronounced at this time, and no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgment that whereas you, Michael J. Cassius, also known as Carl Jackson, having pled guilty in this Court to the charge of burglary in the first degree, it is found by the Court that you are guilty of said crime.

Therefore, it is ordered adjudged and decreed, and the judgment and sentence of the Court is that you, Michael J. Cassius, also known as Carl Jackson, be imprisoned in the State prison at Florence, Arizona, for a term of not less than one year and not more than two years to date from arrival at the Arizona—no. You have been in custody how long? THE DEFENDANT: About three months.

THE COURT: What date is it. Can somebody establish the date?

[20] To date from November 4, 1972. The defendant is remanded to the custody of the Sheriff of Pima County, Arizona, to be by him delivered into the custody of the proper officers of the said State prison.

It is further ordered that a certified copy of this judgment shall be sufficient warrant for said Sheriff to take, keep and safely deliver the said Michael J. Cassius, also known as Carl Jackson, into the custody of the proper officers of said State prison, and the sufficient warrant for the officers of said State prison to keep and imprison the said Michael J. Cassius, also known as Carl Jackson in accordance herewith.

Now, with respect to count 2 of the indictment filed November 14, 1972, the defendant being asked to show legal cause why judgment should not be pronounced and no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgment, that whereas you, Michael J. Cassius, also known as Carl Jackson, pled guilty in the Court of the charge of committing a felony while on bail or on own recognizance,—

MR. HAWKINS: Your Honor, may I correct the Court in that I believe it was submitted and [21] the Court found it.

THE COURT: You are correct. Let us start over on count 2.

The defendant being asked to show legal cause why judgment should not be pronounced at this time and no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgment that whereas you, Michael J. Cassius, also known as Carl Jackson, having been found guilty in this Court of the charge of committing a felony while released upon your own recognizance, it is found by the Court that you are guilty of said crime.

Therefore, it is ordered, adjudged and decreed, and the judgment and sentence of the Court is that you, Michael J. Cassius, also known as Carl Jackson, be punished by imprisonment in the State prison, at Florence, Arizona, for a term of not less than one year and not more than three years to date from the completion of the sentence with respect to count 1 of this indictment entered earlier this date, and the defendant is remanded to the custody of the Sheriff of Pima County, Arizona, to be by him delivered into the custody of the proper officers of the said State prison, and it is further ordered [22] that a certified copy of this judgment shall be a sufficient warrant for the said Sheriff to take, keep and safely deliver the said Michael J. Cassius, also known as Carl Jackson, into the custody of the proper officers of said State prison, and a sufficient warrant for the officers of the said State prison to keep and imprison the said Michael J. Cassius, also known as Carl Jackson in accordance herewith.

Now, it is my duty to advise you in open Court, as I am, that you have a right to appeal from each judgment and sentence. That you have to file notice of appeal within 60 days, that you have a right to have counsel prosecute the appeal, and if indigent, the right to appointed counsel, the right to be furnished without cost a copy of the record and reporter's transcript for appeal purposes.

Now, Mr. Cassius, I want you to know that the sentence I have given you was less than the recommended sentence, and I took into consideration your clearing the cases for the police.

THE DEFENDANT: Thank you.

THE COURT: I want you to know you are the chief beneficiary for what you did Saturday, [23] and I am pleased you did it.

The Defendant is remanded to the custody of the Sheriff.

The Court stands at recess.

MR. HAWKINS: Thank you, Your Honor.

THE DEFENDANT: Thank you.

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

[Caption Omitted in Printing]

JUDGMENT AND COMMITMENT

Filed January 22, 1973

Convicted of: Committing Felony while on bail or own recognizance, a felony (Count II)

On this 22nd day of January, 1973, the defendant being present in open court, in person and by counsel, John Hawkins, and the deputy county attorney, Tom Letnes, being present on the part of the State, and this being the time heretofore fixed for passing judgment on the defendant, the defendant was informed by the Court of the nature of the Information filed charging the crime of Committing felony while on bail or own recognizance, a felony (Count II) committed on or about the 4th day of November, 1972; also of the arraignment and plea of not guilty as charged in the Indictment on the 16th day of November, 1972.

The defendant being asked to show legal cause why judgment should not be pronounced at this time, and no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgment, that, WHEREAS, you Michael J. Cassius, aka Carl Jackson, having been found guilty in this Court to the charge of Committing felony while on bail or own recognizance, a felony (Count II) it is found by the Court that you are guilty of said crime. Therefore,

IT IS ORDERED, ADJUDGED AND DECREED, and the judgment and sentence of the Court is that you Michael J. Cassius, aka Carl Jackson be punished by imprisonment in the State Prison at Florence, Arizona, for a term of not less than one (1) years, and not more than three (3) years, to date from the completion of

the sentence with respect to Count I of the Indictment entered earlier this date and defendant is remanded to the custody of the Sheriff of Pima County, Arizona, to be by him delivered into the custody of the proper officers of said State Prison.

IT IS FURTHER ORDERED that a certified copy of this Judgment shall be a sufficient warrant for said Sheriff to take, keep and safely deliver the said Michael J. Cassius, aka Carl Jackson into the custody of the proper officers of said State Prison, and a sufficient warrant for the officers of said State Prison to keep and imprison the said Michael J. Cassius, aka Carl Jackson in accordance herewith.

Thereupon, the defendant, in open court, was advised by the Court of the right to appeal, of the time in which notice of appeal may be filed and of the right to have counsel to prosecute the appeal, and, if indigent, of the right to appointed counsel and the right to be furnished, without cost, a copy of the record and reporter's transcript for appeal purposes.

/s/ Jack G. Marks
Judge

Copy received at 12 Noon
this 22 day of Jan., 1973

/s/ [Illegible]
Deputy Sheriff
18-1
(Prison)

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

[Caption Omitted in Printing]

JUDGMENT AND COMMITMENT

Filed January 22, 1973

Plea of Guilty to: Burglary, First Degree, a felony (Count I)

On this 22nd day of January, 1973, the defendant being present in open court, in person and by counsel, John Hawkins, and the deputy county attorney, Tom Letnes, being present on the part of the State, and this being the time heretofore fixed for passing judgment on the defendant, the defendant, was informed by the Court of the nature of the Information filed charging the crime of Burglary, First Degree, a felony (Count I) committed on or about the 4th day of November, 1972; also of the arraignment and plea of Guilty as charged in the Indictment on the 4th day of January, 1973.

The defendant being asked to show legal cause why judgment should not be pronounced at this time, and no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgment, that, WHEREAS, you Michael J. Cassius, aka Carl Jackson, having pled guilty in this Court to the charge of Burglary, First Degree, a felony (Count I) it is found by the Court that you are guilty of said crime. Therefore,

IT IS ORDERED, ADJUDGED AND DECREED, and the judgment and sentence of the Court is that you Michael J. Cassius, aka Carl Jackson be punished by imprisonment in the State Prison at Florence, Arizona, for a term of not less than one (1) years, and not more than two (2) years, to date from November 4, 1972. and defendant is remanded to the custody of the Sheriff of Pima County, Arizona, to be by him delivered into the custody of the proper officers of said State Prison.

IT IS FURTHER ORDERED that a certified copy of this Judgment shall be a sufficient warrant for said Sheriff to take, keep and safely deliver the said Michael J. Cassius, aka Carl Jackson into the custody of the proper officers of said State Prison, and a sufficient warrant for the officers of said State Prison to keep and imprison the said Michael J. Cassius, aka Carl Jackson in accordance herewith.

Thereupon, the defendant, in open court, was advised by the Court of the right to appeal, of the time in which notice of appeal may be filed and of the right to have counsel to prosecute the appeal, and, if indigent, of the right to appointed counsel and the right to be furnished, without cost, a copy of the record and reporter's transcript for appeal purposes.

/s/ Jack G. Marks
Judge

[Sheriff's Acknowledgement of Receipt
Omitted in Printing]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

No. 2 CA-CR 331

THE STATE OF ARIZONA, APPELLEE

v.

MICHAEL J. CASSIUS aka CARL JACKSON, APPELLANT

Appeal from the Superior Court of Pima County
Cause No. A-22303

Honorable Jack G. Marks, Judge

REVERSED

OPINION—Filed Nov. 8, 1973

Gary K. Nelson, The Attorney General, Phoenix, by Howard L. Fell, Assistant Attorney General, Tucson, and Frank Leto, Certified Third-Year Law Student under Rule 28(e)

Attorneys for Appellee

Ed Bolding, Pima County Public Defender, Tucson, by Richard Van Duizend, Assistant Public Defender and Jeffrey W. Hanes, Certified Third-Year Law Student under Rule 28(e)

Attorneys for Appellant

KRUCKER, Judge.

This is an appeal from a judgment of conviction and sentences on one count of burglary, first degree, A.R.S. § 13-302, and one count of committing a felony while released on bail or on own recognizance on a separate felony charge, A.R.S. § 13-1580.

The peculiar facts of this case are: On October 17, 1972, appellant, Michael Jerome Cassius, was arrested

and charged with burglary, Cause No. A-22479. The following day, he was released on his own recognizance.

On November 4, 1972, while released on his own recognizance on the first burglary charge, appellant was again arrested for burglary and was charged in Cause No. A-22303 on two counts: Count I, violation of A.R.S. § 13-302 (burglary, first degree) and Count II, violation of A.R.S. § 13-1580 (committing a felony while released on bail or on own recognizance on a separate felony charge).

Proceedings were held on both burglary charges on January 4, 1973. At that time, Cause No. A-22479 was dismissed upon motion of the County Attorney. In Cause No. A-22303, appellant plead guilty to Count I, burglary, and Count II was submitted to the court on the basis of the Grand Jury transcript and stipulation of counsel that at the time of the second burglary appellant was released on his own recognizance in Cause No. A-22479. The court accepted appellant's guilty plea on Count I and found him guilty on Count II.

On January 22, 1973, appellant was sentenced to imprisonment for one and not more than two years on Count I and a consecutive term of not less than one or more than three years was imposed for the Count II conviction. This appeal followed.

Appellant submits two questions for review:

1. Whether appellant's conviction for violation of A.R.S. § 13-1580 (committing a felony while released on bail or on own recognizance) constituted double jeopardy under the Fifth Amendment of the United States Constitution and Art. 2 § 10 of the Arizona Constitution?
2. Whether the sentence imposed pursuant to A.R.S. § 13-1580 violated the statutory proscription of A.R.S. § 13-1641 against double punishment for the same offense?

Before we dispose of the issues raised by appellant, we first consider the State's contention that the issues of double jeopardy and double punishment were not raised below, therefore, are not preserved for appeal. In re-

sponse to this contention, appellant asserts that the issues are preserved by stipulation of counsel. He also argues that double jeopardy and double punishment affect substantial rights requiring this court on its own initiative to notice the defects. We agree with appellee that the double jeopardy issue is not preserved for appeal. However, we find the issue of double punishment properly submitted for review.

Generally, in Arizona the issue of double jeopardy may not be raised for the first time on appeal. State v. Veres, 7 Ariz.App. 117, 436 P.2d 629 (1968), cert. den. 393 U.S. 1014. The purported stipulation relied on by appellant is the following statement of the prosecutor:

> "MR. HOWARD: The charge in count 2 is committing a felony while released on his own recognizance on another felony charge, Your Honor, and the public defender would like to reserve their right to examine that Statute on appeal, so are reluctant to enter a plea at this point, and would prefer to submit it to the Court on the stipulated facts in the Grand Jury transcript, and there are certain matters which I will ask the Court to take judicial notice of from the Court file."

We find this insufficient to preserve the double jeopardy issue for review.

Appellant also asserts that he had no opportunity to raise this issue at the trial court level. We find no merit in this argument. Appellant, after having been found guilty on Count I, made no attempt to utilize Rule 177, Rules of Criminal Procedure, 17 A.R.S.[1] as to Count II on the grounds of prior conviction or double jeopardy. Appellant's failure to raise the issue of double jeopardy below precludes appellate consideration of such issue.

As to the issue of double punishment, however, it may be raised for the firse time on appeal. State v. Mills, 96 Ariz. 377, 396 P.2d 5 (1964). We therefore turn our attention to appellant's contention that the sentences im-

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[1] This case is decided on the law as it existed prior to September 1, 1973.

posed on Count I and Count II constituted double punishment in violation of A.R.S. § 13-1641, which provides:

> "An act or omission which is made punishable in different ways by different sections of the laws may be punished under either, but in no event under more than one. An acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other."

Prior to the Supreme Court decisions in State v. Mitchell, 106 Ariz. 492, 478 P.2d 517 (1970), and State v. Tinghitella, 108 Ariz. 1, 491 P.2d 834 (1971), there appeared to be some confusion in applying A.R.S. § 13-1641. However, as formulated in *Mitchell*, supra, and adopted in *Tinghitella*, supra, an "identical elements" test is the standard, requiring elimination of the elements in one charge and a determination of whether the facts left support the other charge. *See also*, State v. Horton, 108 Ariz. 16, 492 P.2d 395 (1972); State v. George, 108 Ariz. 5, 491 P.2d 838 (1971); and State v. Bartky, 16 Ariz. App. 421, 493 P.2d 1226 (1972).

In spite of the seeming simplicity of this statute and the test, judicial interpretation and application to a given set of facts has proven to be a complex task. This case is no exception.

Our review of the myriad of cases dealing with the application of A.R.S. § 13-1641 sheds no light on the problem *sub judice*. We find no case with a factual posture remotely similar to this case. However, there is one common denominator—the purpose of the subject statute is to protect an offender against double punishment for a *single act* which violates more than one statute. *See*, *Mitchell*, supra; State v. Andrews, 106 Ariz. 372, 476 P.2d 673 (1970); State v. Ballez, 102 Ariz. 174, 427 P.2d 125 (1967); and State v. Hutton, 87 Ariz. 176, 349 P.2d 187 (1960).

As previously noted, appellant, in Cause No. A-22303, was found guilty and sentenced on two counts: Count I, violation of A.R.S. § 13-302, and Count II, violation of A.R.S. § 13-1580. The pertinent provisions of these statutes are:

"§ 13-302. Definition and degrees of burglary; punishment

A. A person entering a building, dwelling house office, room, apartment, tenement, shop, warehouse, store . . . with intent to commit grand or petty theft, or any felony . . . is guilty of burglary.

B. Burglary committed in the nighttime is burglary of the first degree, punishable by imprisonment in the state prison for not less than one or more than fifteen years."

"§ 13-1580. Committing felony while on bail on felony charge; penalty

A person who is convicted of committing any felony offense, whether federal or state, which felony offense is committed while such person is released on bail or his own recognizance on a separate felony charge is guilty of the offense of committing a felony while released on bail or his own recognizance and upon conviction of such crime shall be punished by imprisonment in the state prison for not more than five years. Such penalty shall be in addition to and shall be served consecutively to any penalty imposed for the offense committed while released on bail or on his own recognizance."

The elements necessary to prove burglary, first degree, are: (1) an entry, (2) with intent to commit a felony, and (3) commission in the nighttime. A violation of A.R.S. § 13-1580 requires (1) a conviction of committing any felony, (2) which is committed while a person is released on bail or his own recognizance on a separate felony charge.

Appellant's only *act* was the burglary of November 4, 1972, which was committed while he was released on his own recognizance on a separate felony charge. For this *single act*, he has been convicted and sentenced for two felony offenses. If one or all of the elements of burglary are eliminated, what facts are left to support the charge under A.R.S. § 13-1580? There are none. We find no other *act* by appellant, hence no support for a charge under A.R.S. § 13-1580. The factual basis for conviction

under either statute is the same *act* on the part of appellant.

The State, however, argues that the elements of A.R.S. § 13-1580 are different, i.e., (1) conviction of a felony and (2) such felony having been committed during a designated period. We find such argument specious. The "conviction" element is a *judicial act*, not appellant's, leaving only the burglary as the act of appellant. To adopt the State's construction would defeat the very purpose of A.R.S. § 13-1641 and allow the prosecution to accomplish indirectly that which cannot be done directly.

Application of the "identical elements" test enunciated by our Supreme Court would mandate the conclusion that the statutory proscription of A.R.S. § 13-1641 has been violated. However, to so hold would render A.R.S. § 13-1580 completely inoperative. We must presume that the legislature did not intend to do a futile act in enacting A.R.S. § 13-1580. Campbell v. Superior Court, 105 Ariz. 252, 462 P.2d 801 (1969). We also assume that the legislature was aware of the existence of A.R.S. § 13-1641 and therefore that A.R.S. §§ 13-1641 and 13-1580 were intended to operate as a compatible whole. *See*, Arizona State Board of Directors v. Phoenix Union High School District, 102 Ariz. 69, 424 P.2d 819 (1967). It must, therefore, have been the intention of the legislature to except from A.R.S. § 13-1641 the later-enacted A.R.S. § 13-1580. However, whether or not such exception was intended, we are of the opinion that A.R.S. § 13-1580 is violative of the equal protection clause of the 14th Amendment to the United States Constitution.

Initially we note that appellant did not attack the constitutionality of A.R.S. § 13-1580 in the trial court. Generally, constitutional questions must first be presented to the trial court for determination. Porter v. Eyer, 80 Ariz. 169, 294 P.2d 661 (1956). However, fundamental error is such error as goes to the foundation of the case, or which takes from a defendant a right essential to his defense, State v. Pulliam, 87 Ariz. 216, 349 P.2d 781 (1960), and we must search the record for such error in all criminal appeals. State v.

Powell, 5 Ariz.App. 51, 423 P.2d 127 (1967). Furthermore, this court on its own initiative should notice defects which affect substantial rights, principally those affecting constitutional rights, solely to prevent a miscarriage of justice. State v. Gilreath, 107 Ariz. 318, 487 P.2d 385 (1971).

As stated in State v. Pugh, 31 Ariz. 317, 252 P. 1018 (1927):

> "But where for any constitutional reason the law under which a party is being prosecuted is void, the question need not be formally raised, as when that fact is discovered by the court, even on appeal, it will be considered." 31 Ariz. at 319.

Therefore, in accordance with our absolute duty to protect constitutional rights, Marquez v. Rapid Harvest Co., 1 Ariz.App. 562, 405 P.2d 814 (1965), and to prevent a miscarriage of justice, we raise the constitutionality of A.R.S. § 13-1580 *ex mero motu*.

Since this case involves a crime relating to bail and the release of one on his own recognizance, it is important to understand the nature and purpose of bail. In Arizona, bail is a constitutionally protected right. Art. 2 § 22 of the Arizona Constitution provides:

> "All persons charged with crime shall be bailable by sufficient sureties, except for:
>
> 1. Capital offenses when the proof is evident or the presumption great.
> 2. Felony offenses, committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge."

Although bail is conditioned upon the giving of "sufficient sureties," Rendel v. Mummert, 106 Ariz. 233, 474 P.2d 824 (1970), it is nonetheless a constitutionally protected right. As stated in Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951):

> "This traditional right to freedom before conviction permits the unhampered preparation of a defense,

> and serves to prevent the infliction of punishment prior to conviction. [Citations omitted] Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." 72 S.Ct. at 3.

Bail is exacted for the *sole* purpose of securing attendance of the defendant in court at all times when his presence may be lawfully required, and his surrendering himself in execution of any lawful judgment that may be pronounced against him. Gusick v. Boies, 72 Ariz. 309, 234 P.2d 430 (1951). When setting bail, the judge should take into account the defendant's prior arrests and convictions, his record of appearances at court proceedings, his record of flight to avoid prosecution, and his failure to appear at court proceedings. Rendel v. Mummert, supra. It is assumed that the threat of forfeiture of one's goods will be an effective deterrent to the temptation to breach the conditions of one's release. Brandy v. United States, —— U.S. ——, 81 S.Ct. 197, —— L.Ed.2d —— (1960).

With this background, we turn to the constitutionality of A.R.S. § 13-1580. The basic principles governing application of the equal protection clause of the Fourteenth Amendment are familiar. As the Chief Justice recently explained in Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971):

> "In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1885); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911); Railway Express Agency v. New York, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949); McDonald v. Board of Election Commissioners, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into differ-

ent classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920)." 92 S.Ct. at 253, 254.

A.R.S. § 13-1580 creates two classes of accused persons and treats them differently. Thus the question is whether different treatment of those on bail or their own recognizance as opposed to those remaining in jail bears a rational relationship to the objectives apparently sought to be advanced by the operation of A.R.S. § 13-1580.

This statute was not adopted from any other jurisdiction, and we know of no other jurisdiction with a similar one. Although there is no legislative history to shed light on the legislative intent, and we have not had the benefit of appellate argument thereon, it is evident that A.R.S. § 13-1580 has a two-fold objective: (1) deterrence of criminal activity on the part of individuals who have been released on bail or on their own recognizance, and (2) enhancement of punishment of those who engaged in criminal activity while so released. These objectives are clearly rational and reasonable. However, the operation of this statute transcends those objectives.

When the legislature enacted A.R.S. § 13-1580, it created a separate criminal offense—the offense of committing a felony while released on bail or own recognizance. By statute, a class of individuals who have exercised their state constitutional right to bail has been singled out. As to these individuals, the legislature has declared it to be a crime to be convicted of a crime. On the other hand, had they failed to exercise their constitutional right and remained in jail, there can be no such crime.

A simple illustration will demonstrate how this statute operates. For example, A and B are both arrested and charged with burglary. A is released on bail and B remains in jail. While released, A commits aggravated battery on a police officer. While in jail, B also commits

aggravated battery on a police officer. Pursuant to a plea bargain, the original battery charges against both A and B are dropped in exchange for a plea of guilty to the battery charges. Notwithstanding the fact that A and B have committed identical crimes, A may be convicted of two crimes—(1) aggravated battery and (2) committing a felony while released on bail or own recognizance. However, B can only be convicted of aggravated battery because his crime was committed in jail. Taken one step further, assume that A had been mistakenly accused and was totally innocent of the burglary charge. Under A.R.S. § 13-1580 he may still be convicted of two criminal offenses for the single battery solely because the act was committed while on bail. We fail to see any rational relationship between the objectives of A.R.S. § 13-1580 and its operation.

The Supreme Court of California in the case of In re King, 3 Cal.3d 226, 90 Cal.Rptr. 15, 474 P.2d 983 (1970), held unconstitutional a California statute which prescribed varying penalties between two categories of non-supporting fathers—(1) those who remain out of state for 30 days and (2) those who do not. Under the statute, any father who remained out of the State of California for 30 days while not supporting his child was guilty of a felony and a father who committed the identical act of criminal nonfeasance, but happened to be within California, was guilty only of a misdemeanor. The court found this provision a denial of equal protection of the laws because it created additional criminal liability on an individual solely because he chose to remain outside the state. The court pointed out that:

> "'If a law has 'no other purpose * * * than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' United States v. Jackson, 390 U.S. 570, 581, 88 S.Ct. 1209, 1216, 20 L.Ed.2d 138 (1968).'" 90 Cal.Rptr. at 21, 22

Similarly, in Spillers v. State, 84 Nev. 23, 436 P.2d 18 (1968), the Supreme Court of Nevada held unconstitutional a statute which provided that a person con-

victed of rape could not be sentenced to death if the case were tried to the court, but death could be imposed if affixed by a jury verdict. The court stated:

> "A State may not prescribe different penalties for the same offense without violating the equal protection concept. Thus the statute is unconstitutional insofar as it allows a jury to impose a greater penalty than a court for the same offense, thus violating the Sixth and Fourteenth Amendments to the federal constitution, and art. 1, § 3 of our state constitution." 436 P.2d at 23.

Although *King* and *Spillers* were not concerned with a state constitutional right to bail, they denounced exactly that which our statute attempts—(1) the prescribing of different penalties for the same offense and (2) penalizing one for exercising a constitutional right. A.R.S. § 13-1580 not only prescribes different penalties for the same offense, but also creates an additional crime for the same offense, which crime can only be committed after one has exercised his constitutional right to bail.

As noted earlier, the sole purpose of bail is to secure the attendance of a defendant at trial. Making it an offense to be convicted of a felony which was committed while on bail neither helps secure the attendance of a defendant at trial nor insures compliance with the legal processes of this State. It serves no other purpose than to make bail an instrument of oppression which our Supreme Court has denounced. *Gusick*, supra. Our legislature has effectively chilled the assertion of the constitutional right to bail by penalizing those who have chosen to exercise it.

Regardless of the character of the crime, an accused on bail is clothed with the presumption of innocence. *Gusick*, supra. By singling out those admitted to bail, A.R.S. § 13-1580 strips the innocent of that presumption. One accused of a crime is not *ipso facto* a menace to society as A.R.S. § 13-1580 seems to presume. Such a presumption erodes the very foundation of our system of criminal justice, namely, the presumption of innocence.

If one is in fact a menace to society, adequate protective devices already exist. Art. 2 § 22 of our Constitution is itself designed to protect society from the dangerous. Paragraph 2 of that section denies bail, under designated circumstances, to a person who commits a felony while admitted to bail. A court may in its discretion set a higher bail for a defendant having recidivist tendencies. Release from custody is conditioned on good behavior while so released, A.R.S. § 13-1577(D), and upon a breach of such condition, bail may be revoked. A.R.S. § 13-1578; *Rendel*, supra.

To achieve the objectives of A.R.S. § 13-1580, there is a reasonable way available with a lesser burden on the constitutionally protected right to bail. As was done in the District of Columbia [2] the legislature could enact a law enhancing the punishment of those who commit a felony while released on bail or own recognizance. Unlike our statute, in the District of Columbia it is not a *crime* to commit a crime while released on bail.

Although we need not decide the question of inverse discrimination, it should be noted that in Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), it was recognized that if a wrongdoer were insulated from punishment because of indigency, equal

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[2] D.C. Code Ann., § 23-1328 (1971), provides:

"Penalties for offenses committed during release

(a) Any person convicted of an offense committed while released pursuant to section 23-1321 shall be subject to the following penalties in addition to any other applicable penalties:

(1) A term of imprisonment of not less than one year and not more than five years if convicted of committing a felony while so released; and

(2) A term of imprisonment of not less than ninety days and not more than one year if convicted of committing a misdemeanor while so released.

(b) The giving of a warning to the person when released of the penalties imposed by this section shall not be a prerequisite to the application of this section.

(c) Any term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment."

protection would be denied the offender who is punished. The Supreme Court stated:

> "The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to an inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction." 90 S.Ct. at 2024.

Under A.R.S. § 13-1580, one on bail or own recognizance is punished twice for one act, whereas the person who cannot afford bail is insulated from such double punishment even though he committed the identical act. The indigent who cannot afford bail is subject to a single charge.

We agree that the legislative objective in enacting A.R.S. § 13-1580 is commendable, but it is unfortunate that, as written, it cannot withstand constitutional scrutiny. We therefore hold that A.R.S. § 13-1580 is unconstitutional and appellant's conviction on Count II cannot stand. The judgment of conviction and sentence imposed thereon are ordered vacated.

HERBERT F. KRUCKER
Judge

CONCURRING:

JAMES D. HATHAWAY
Chief Judge

LAWRENCE HOWARD
Judge

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

No. 2 CA-CR 331

THE STATE OF ARIZONA, APPELLEE,

v.

MICHAEL J. CASSIUS, AKA CARL JACKSON, APPELLANT.

PIMA County
Superior Court
Cause No. A-2?303

Filed Dec. 11, 1973

ORDER

IT IS ORDERED that the Motion for Rehearing be, and the same hereby is, denied.

Dated: December 11, 1973.

/s/ James D. Hathaway
Chief Judge

/s/ Lawrence Howard
Judge

/s/ Herbert F. Krucker
Judge

SUPREME COURT
STATE OF ARIZONA

No. 2867-PR

January 23, 1974

THE STATE OF ARIZONA, APPELLEE,

v.

MICHAEL J. CASSIUS, AKA CARL JACKSON, APPELLANT.

CORRECTED COPY

The following action was taken by the Supreme Court of the State of Arizona on January 22, 1974 in regard to the above-entitled cause:

"ORDERED: Petition for Review—Granted."

The Supreme Court has adequate sets of briefs. Therefore, no additional briefs will be necessary.

Clifford H. Ward
Clerk

By /s/ Mary Ann Hopkins
Deputy Clerk

SUPREME COURT
STATE OF ARIZONA

Supreme Court No. 2867-PR

[Caption Omitted in Printing]

The following action was taken by the Supreme Court of the State of Arizona on February 19, 1974 in regard to the above-entitled cause.

"ORDERED: Request for Oral Argument—Denied.

FURTHER ORDERED: Motion for Leave to Submit Authorities—Granted.

FURTHER ORDERED: Defendant granted 30 days in which to submit said authorities."

Clifford H. Ward
Clerk

By /s/ Mary Ann Hopkins
Deputy Clerk

IN THE SUPREME COURT OF THE
STATE OF ARIZONA
En Banc

No. 2867-PR

THE STATE OF ARIZONA, APPELLEE,

v.

MICHAEL J. CASSIUS, AKA CARL JACKSON, APPELLANT.

Appeal from the Superior Court of Pima County
Honorable Jack Marks, Judge
(Cause No. A-22303)

JUDGMENT AND SENTENCE AFFIRMED

Opinion of the Court of Appeals, Division Two, 21 Ariz. App. 78, 515 P.2d 903 (1973) Vacated Filed April 16, 1974

Gary K. Nelson The Attorney General	Phoenix
By Howard L. Fell Assistant Attorney General	Tucson
Frank Leto Third Year Law Student	Tucson
Attorneys for Appellee	
John M. Neis Pima County Public Defender	Tucson
Ed P. Bolding, Former Pima County Public Defender	Tucson
By Richard Van Duizend Former Assistant Public Defender	Tucson

Jeffrey W. Hanes
Third Year Law Student Tucson

Attorneys for Appellant

HAYS, Chief Justice

The defendant, Michael J. Cassius, also known as Carl Jackson, appealed from a judgment finding him guilty of having committed a felony while free on his own recognizance, in violation of A.R.S. § 13-1580. The Court of Appeals reversed the trial court in State v. Cassius aka Jackson, 21 Ariz. App. 78, 515 P.2d 903 (1973). We granted the state's petition for review. We vacate the opinion of the Court of Appeals and affirm the judgment and sentence of the Superior Court.

Defendant, while free on his own recognizance on a burglary charge, was caught burglarizing a building less than three weeks after his release. Because of the second burglary, he was indicted on two counts: (1) first degree burglary, and (2) committing a felony while free on his own recognizance. As a result of a plea bargain, he pleaded guilty to the first count—the second burglary—and agreed to be tried on the second count with the evidence limited to the grand jury minutes and the stipulation that he was free on his own recognizance at the time of the second arrest. In return, the state dismissed the charges based on the first burglary. The trial judge sentenced him to one to two years in prison for the burglary, and imposed a consecutive sentence of one to three years after finding him guilty on Count 2.

On appeal, defendant raised two questions: (1) whether the second count was a violation of the double jeopardy clause of the state and federal constitutions, and (2) whether the second count was a violation of A.R.S. § 13-1641, which provides that a conviction and sentence for a criminal act bars a subsequent prosecution for the same act.

The Fifth Amendment to the United States Constitution provides that no person shall be twice put in jeopardy *for the same offense.* This prohibition is binding upon the states. Benton v. Maryland, 395 U.S. 784, 89 S. Ct.

2056, 23 L. Ed. 2d 707 (1969). The Arizona Constitution, Art. 2 § 10, contains substantially the same language.

The fallacy of defendant's argument on the issue of double jeopardy is that we are not, in the instant case, dealing with *the same offense*. The first count charged him with burglary. The second count charged him with being convicted of a felony while free on his own recognizance. These offenses are entirely different.

The question of whether two offenses are the same, and the criteria for resolving that question, are set out in State v. Tinghitella, 108 Ariz. 1, 491 P.2d 834 (1971). There, we held that in order to constitute different offenses, no element of either offense may be an element of the other; *i.e.*, the two offenses must not contain a common element. It is quite obvious that the two offenses with which defendant was charged have no common element.

The federal courts use a different test, less favorable to the defendant. They hold that the offenses charged are not the same if each contains an element not contained in the other. Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). It is, therefore, perfectly clear that double jeopardy is not a viable defense in this case. These matters are analyzed in 14 Arizona Law Review 513.

Defendant's second point is that the conviction and sentence under A.R.S. § 13-1580 violates A.R.S. § 13-1641 which reads:

> "An act or omission which is made punishable by different sections of the laws may be punished under either, but in no event under more than one. An acquittal, or conviction and sentence under either one bars a prosecution for the same act or omission under any other."

The material part of A.R.S. § 13-1580 reads:

> "A person who is convicted of committing any felony offense . . . which felony offense is committed while such person is released on his own recognizance on a separate felony charge, is guilty of the offense of committing a felony while released on . . . his

> own recognizance, and upon conviction . . . shall be punished by imprisonment . . . for not more than five years."

It is, of course, obvious that these two sections can be read as contradictory unless some sort of statutory construction is applied to them, since a person who commits a felony while free on his own recognizance, may be guilty of two felonies under § 13-1580.

We will not assume that the legislature, in enacting a statute, was unaware of an existing statute. Arizona State Board of Directors v. Phoenix Union High School Dist., 102 Ariz. 69, 424 P.2d 819 (1967). Where statutes in *pari materia* are in apparent conflict, they should be construed in harmony so as to give force and effect to each. State Land Dept. v. Tucson Rock & Sand Co., 107 Ariz. 74, 481 P.2d 867 (1971). Where a later statute does not expressly repeal a former one, they should be construed so as to give effect to each, if possible. State v. Jaastad, 43 Ariz. 458, 32 P.2d 799 (1934). When dealing with separate statutes, the court must construe them so as to give meaning to both, if possible. Finch v. State Department of Public Welfare, 80 Ariz. 226, 295 P.2d 846 (1956). The presumption is that the legislature did not intend to do a futile thing by including in a statute a provision which is nonoperative or invalid. Kelly v. Bastedo, 70 Ariz. 371, 220 P.2d 1069 (1950). Where a statute first expresses a general intent, and later an inconsistent particular intent, such particular intent will be taken as an exception to the general intent, and both will stand. Sakrison v. Pierce, 66 Ariz. 162, 185 P.2d 528 (1947).

We believe the application of these rules should and does lead us to the conclusion that the legislature intended to engraft § 13-1580 onto § 13-1641 as an exception so that the two statutes should be read to mean that for one act there may be only one prosecution except when it is committed while the accused is out of jail on his own recognizance. Read in this way, neither quoted section conflicts with the other, and each is given full effect. We therefore hold that the position taken by defendant in his second point is untenable.

Ordinarily, covering all of the points made by defendant in his appeal brief disposes of the appeal and points the way to the final disposition, unless a search of the record discloses some fundamental error not raised by defendant. We have examined the record for fundamental error and find none. However, we note that the Court of Appeals also examined the record for fundamental error and found that it existed in the form of a violation of the equal protection clause of the state and federal constitutions. The court's holding is based on the argument that A.R.S. § 13-1580 creates two classes of persons and treats them differently. The court felt that the class which has exercised its constitutional right to bail has been singled out by making it a crime for a member of that class to be convicted of a crime, while the class which has not exercised the right to bail is not so restricted. We completely disagree with this reasoning.

While it is true that the right to bail has a constitutional basis, it has always been recognized that limitations may be imposed upon it. Generally, bail is granted on condition that the defendant stay within the court's jurisdiction and that he conduct himself as a law-abiding citizen. Rule 7.3 of the new Rules of Criminal Procedure, 17 A.R.S., makes this last requirement mandatory. There has never been any doubt that these are legitimate conditions. The Court of Appeals felt that our statute has the effect of chilling the assertion of the constitutional right to bail by penalizing those who choose to exercise that right. But merely requiring that a man abide by the law is not a chilling limitation; it is a requirement that he is obligated to follow whether or not on bail, and it existed even before bail was granted.

The opinion of the Court of Appeals recognizes that it would be constitutional to *increase the punishment* for a crime committed while out on bail! We fail to see the distinction. As a matter of fact, we have a recidivist statute, enhancing the punishment of defendants who have prior convictions, and it has never been held to be a violation of the equal protection clauses. In State v. Sanchez, 110 Ariz. 214, 516 P.2d 1226 (1973), we cited

the following language of the United States Supreme Court:

> "The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is done without any reasonable basis, and therefore is purely arbitrary." 516 P.2d at 1229.
>
> * * * *
>
> "When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted, must be assumed." 516 P.2d at 1229.
>
> * * * *
>
> "One who assails the classification in such a law must carry the burden of showing that it does not rest on any reasonable basis, but is essentially arbitrary. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S. Ct. 337, 340, 55 L. Ed. 369 (1911)." 516 P.2d at 1229.

It is true that, as the Court of Appeals points out, it is unconstitutional to legislate that different treatment be accorded to persons placed by statute into different classes, on the basis of criteria wholly unrelated to the objective of that statute. We see no application of that rule to this case.

The opinion of the Court of Appeals is vacated, and the judgment and sentence of the Superior Court are affirmed.

JACK D. H. HAYS
Chief Justice

CONCURRING:

JAMES DUKE CAMERON
Vice Chief Justice

FRED C. STRUCKMEYER, JR.
Justice

LORNA E. LOCKWOOD
Justice

WILLIAM A. HOLOHAN
Justice

SUPREME COURT

STATE OF ARIZONA
Phoenix 85007

May 22, 1974

Supreme Court No. 2867-PR

Pima County No. A-22303

STATE OF ARIZONA, APPELLEE,

v.

MICHAEL J. CASSIUS AKA CARL JACKSON, APPELLANT.

The following action was taken by the Supreme Court of the State of Arizona on May 21, 1974 in regard to the above entitled cause:

"ORDERED: Motion for Rehearing—Denied."

Copy of Order Affirming Judgment and Sentence enclosed herewith.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-5140

MICHAEL J. CASSIUS, PETITIONER,

v.

ARIZONA

On petition for writ of Certiorari to the Supreme Court of the State of Arizona.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 15, 1974

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